No. 95-13

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

EXECUTIVE LEASING CORPORATION, MANUEL GONZALEZ GIERBOLINI, and LUZ IRAIDA GONZALEZ,

Petitioners,

v.

BANCO DE PONCE, (now BANCO POPULAR DE PUERTO RICO, as successor-in-interest) and BANPONCE CORP.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITIONERS' REPLY BRIEF

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Pursuant to Supreme Court Rule 15.6, petitioner Executive Leasing Corporation ("Executive Leasing") replies to points raised in respondent Banco Popular de Puerto Rico's ("Banco") opposition to the petition for writ of certiorari.[1]

INTRODUCTION

Banco's brief, instead of squarely addressing the substantive issues that Executive Leasing has raised, seeks primarily to avoid them. The novel and important question presented for review is whether Executive Leasing may introduce evidence extrinsic to the loan agreement to prove that Banco violated the Bank Holding Company Act ("BHCA"), 12 U.S.C. § 1972, by orally conditioning its financing of Executive Leasing's business on the requirement that Executive Leasing refrain from dealing with any other bank (the "exclusive dealing condition"). Although Banco does not deny that extrinsic evidence may be admitted to establish tying violations under *other* federal antitrust statutes, it does not explain why a different rule should apply to tying violations under the BHCA. Nor does it address the logical inconsistency between the legislature's plain intent to prohibit oral tying conditions and Banco's position that such conditions cannot be proven. Instead, in a transparent attempt to distract the Court from the central issue, Banco repeatedly argues *facts* which were not addressed by the Courts below and are not relevant to the legal issue before this Court.

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[1] The petition for writ of certiorari will be referred to as "Pet."; the appendix to the petition as "Pet. App."; and the respondents' opposition to the petition as "Opp."

ARGUMENT

I. EXECUTIVE LEASING'S PETITION WAS TIMELY FILED.

Contrary to Banco's assertion, Executive Leasing's petition for writ of certiorari was timely filed. Under Supreme Court Rule 13.4, the time for filing a petition for writ of certiorari runs from the date the petition for rehearing was denied. The First Circuit issued an order denying the petition for rehearing *nunc pro tunc* as of March 28, 1995. Pet. App. at 28A. The petition was filed on June 23, 1995, less than 90 days after March 28, 1995.

The First Circuit's order amending the date on the denial of the petition for rehearing, *nunc pro tunc*, to March 28, 1995 (Pet. App. at 28A) was issued to correct an error made by the First Circuit. The First Circuit failed to date its initial order denying Executive Leasing's petition for rehearing (Pet. App. at 26A), and then the clerk's office informed Executive Leasing's new counsel that its petition had been denied on March 28, 1995. When another notice dated March 20, 1995, was later issued (Pet. App. 27A) and came to the attention of counsel, the First Circuit upon a duly filed motion appropriately exercised its authority under Fed. R. App. P. 2, 26(b), and 27(b) to control its docket and correct the error to conform to the statement of the Clerk's Office. The First Circuit amended its order before Executive Leasing filed its petition for certiorari, and its action did not change this Court's jurisdiction in any way. Given these circumstances, Executive Leasing's petition was timely filed.[2]

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[2] Two of the cases on which Banco relies for its timeliness argument have no relevance here, and the third only supports the argument that Executive Leasing's petition was timely filed. *Federal Election Comm'n v. NRA Political Victory Fund*, 115 S. Ct. 537 (1994), which relies principally on agency law, holds that a

II. EXECUTIVE LEASING DID NOT WAIVE ITS ARGUMENT.

There is also no merit in Banco's claim that Executive Leasing waived the right to challenge the trial court's exclusion of extrinsic evidence to prove an oral tying condition prohibited by the BHCA. Banco attempts to recharacterize the arguments in Executive Leasing's petition as asserting a "conflict" between Puerto Rico law and the BHCA, or as suggesting that the BHCA "preempts" Puerto Rico law (concepts that are not mentioned anywhere in Executive Leasing's petition). However, it is beyond peradventure that Executive Leasing has consistently maintained at all levels of this litigation that the extrinsic evidence of Banco's oral exclusive dealing condition is admissible to prove a violation of the BHCA.[3]

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petition for certiorari filed by an unauthorized agent cannot be ratified after the 90-day deadline for filing the petition. *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196 (1988), addresses the issue of when a lower court's judgment is sufficiently final to be appealed. In *Missouri v. Jenkins*, 495 U.S. 33 (1990), this Court found the petition for certiorari to be timely and gave great deference to the Court of Appeals' amendment of its order on a petition for rehearing, even when the amendment had the effect of extending the time to file a petition for certiorari. 495 U.S. at 49-50 (court's amended order denying petition for rehearing established beginning of 90-day period for filing petition for certiorari; "The Eighth Circuit surely knows more than we do about the meaning of its orders, and we accept its action for what it purports to be.")

[3] Executive Leasing did not waive the right to seek review of this issue by arguing below that Puerto Rico's parol evidence rule would not bar the introduction of such evidence to prove a violation of the BHCA. *Playboy Enterprises, Inc. v. Public Service Comm'n of Puerto Rico*, 906 F.2d 25 (1st Cir.), *cert. denied*, 498 U.S. 959 (1990), on which Banco relies, is not apposite here. In *Playboy*, a party objected to the introduction of certain evidence as

This Court has rejected the hypertechnical microanalysis on which Banco relies in asserting waiver. In *Kamen v. Kemper Financial Services, Inc.*, 500 U.S. 90 (1991), for example, a shareholder in a derivative suit argued in her principal brief in the Court of Appeals that the federal Investment Company Act did not require a shareholder to make demand on the company's directors before bringing suit on the federal statute. She argued in her reply brief that applicable *state* law did not impose a demand requirement. This Court held that the shareholder's failure to advert to state law before filing her reply brief did not waive her right to the application of anything other than a uniform federal rule of demand, stating:

> When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law.

500 U.S. at 99, *citing Arcadia v. Ohio Power Co.*, 498 U.S. 73, 77 (1990).

Here, Executive Leasing has raised the issue of the admissibility of extrinsic evidence of Banco's exclusive dealing condition at every level. Executive Leasing argued in the Court of Appeals that the evidence should be admitted despite Puerto Rico's parol evidence rule. Executive Leasing argued in its principal brief on appeal that "the proper methodology for dealing with extrinsic evidence had to take into account that the gravamen of the Amended Complaint is that Banco violated specific prohibitions of the BHCA from the outset of its relations

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hearsay. On appeal, the party for the first time challenged the same evidence as lacking credibility, a substantively distinct attack. Here, on the other hand, Executive Leasing has uniformly maintained that extrinsic evidence is admissible to prove an oral tying condition in violation of the BHCA.

with Executive Leasing," and that, "[i]n the face of such allegations, the District Court could not exclude the evidence proffered by Executive Leasing under Rule 69(B) or under the Civil Code." Brief on Appeal for Plaintiffs-Appellants at 35.

In its reply brief, Executive Leasing cited federal cases which hold that the presence of a tying condition prohibited by the federal antitrust laws may be "inferred from an extrinsic course of conduct supplementing the written contract." Reply Brief at 6 n.9. At oral argument, Executive Leasing's counsel argued that the BHCA's plain language prohibiting the imposition of tying conditions "in any manner" required the admission of extrinsic evidence to establish a violation of the BHCA. In a December 12, 1994, letter to the Court of Appeals pursuant to Fed. R. App. P. 28(j), Executive Leasing brought to the Court's attention the discussion of the parol evidence issue in *Dibidale of Louisiana, Inc. v. American Bank & Trust Co.*, 916 F.2d 300 (5th Cir. 1990), to further support its arguments. In its petition for rehearing, Executive Leasing argued that the First Circuit's position that extrinsic evidence could not be admitted to prove an oral tying condition under the BHCA conflicted with decisions of other circuits. Petition for Rehearing at 2-8.

In short, because Executive Leasing has challenged the exclusion of extrinsic evidence at all stages of this litigation, there has been no waiver.

III. THERE IS A CONFLICT AMONG THE CIRCUITS ON THE ADMISSIBILITY OF EXTRINSIC EVIDENCE TO PROVE A TYING VIOLATION UNDER THE BHCA.

For various reasons, Banco errs in claiming that there is no conflict in the circuits as to whether a tying

violation under the BHCA may be proved with extrinsic evidence. First, Banco asserts simplistically that there is no conflict because all the federal circuits "recognize and enforce parol evidence rules." Opp. at 2-3. Banco misperceives Executive Leasing's argument. The conflict at issue here lies *not* in whether federal courts enforce parol evidence rules at all, but in whether they use such rules to exclude extrinsic evidence of an oral tying condition in violation of the BHCA.

Second, Banco errs in arguing that the First Circuit's decision below does not conflict with *Dibidale of Louisiana, Inc. v. American Bank & Trust Co.*, 916 F.2d 300 (5th Cir. 1990). The fact that *Dibidale* involved, among other things, the question of whether plaintiff must prove that it was *actually* coerced by a lender's imposition of a tying condition is a distinction with no substance. In *Dibidale*, after the district court held that the BHCA required proof of actual coercion, the Fifth Circuit reversed and remanded to allow the borrower to prove its BHCA claims of an oral tying condition. *Dibidale* made it clear that such proof would be made by affidavits extrinsic to the written agreement. The decision also made it clear that the Fifth Circuit (unlike the First Circuit in this case) deemed extrinsic evidence of an oral tying condition to be admissible, *regardless* of the existence of a written agreement:

> The banks' contention that the parol evidence rule precludes Dibidale from raising these allegations [of an oral tying condition] in light of language in the loan agreement stating that Dibidale hired Theriot of its own free will is without merit. *The terms of the loan agreement notwithstanding*, the relevant issue is whether Dibidale has provided sufficient evidence that

> its hiring of Theriot was a condition or requirement of the loan so as to survive the banks' motions for summary judgment.

916 F.2d at 307 n.4 (emphasis added).

Banco also errs in arguing that *Integon Life Ins. Corp. v. Browning*, 989 F.2d 1143 (11th Cir. 1993), shows "that there is no conflict between the BHCA and the parol evidence rule." Opp. at 10. To the contrary, *Integon* shows that the Eleventh Circuit, like the Fifth Circuit, would admit extrinsic evidence of an oral tying condition in a suit under the BHCA.

The court in *Integon*, over defendants' objections and for the purpose of reviewing the district court's decisions on motions for summary judgment, assumed the existence of an oral tying condition that plaintiff sought to establish by extrinsic evidence. The court held, contrary to *Dibidale*, that proof of coercion *was* required under the BHCA, and further found that the borrower as a matter of law had not been coerced by the alleged oral condition. The language of the *Integon* opinion on which Banco relies does *not* suggest that extrinsic evidence of an oral condition may not be admitted; such a conclusion would obviously have been contrary to the holdings of the other antitrust cases on which the *Integon* court relied. *See Integon*, 989 F.2d at 1150-1151; Pet. at 10-14 & n.8. Instead, that language reflects the Eleventh Circuit's position that courts should look closely at such claims to determine whether the borrower was in fact coerced, with the ensuing anticompetitive effects.

Moreover, the *Integon* court expressly stated that *Dibidale* was *consistent* with *Integon's* holdings, as the facts in *Dibidale* showed that the borrower had actually been coerced by the alleged oral condition. 989 F.2d at 1151 n.20. The detailed discussions in *Integon* and *Dibidale* of whether the BHCA required proof of actual coercion, and of whether the facts would support a finding of actual coercion, would have been wholly unnecessary if those courts had accepted the notion that an oral tying condition cannot be established with

extrinsic evidence. In sum, the conflict here could not be clearer: the Fifth and Eleventh Circuits would admit extrinsic evidence to establish a tying claim under the BHCA, while the First Circuit and the district court in Michigan would exclude it. Pet. at 11.

Third, while acknowledging that federal courts admit extrinsic evidence to prove violations of other federal anti-tying provisions, Banco hastily labels these cases "irrelevant" and "inapposite" without attempting any reasoned explanation. Contrary to Banco's suggestion, the antitrust cases Executive Leasing has cited do *not* limit the admission of extrinsic evidence of oral tying conditions to situations involving fraud, coercion, or mistake.[4] Rather, as Executive Leasing explained in its petition, their rationale for admitting such extrinsic evidence is that a tying condition may harm competition just as much when it is imposed tacitly as when it is incorporated expressly in a written agreement. *See* Pet. at 12-14 & n.8. The Court of Appeals' decision in this case is in direct conflict with the accepted rule in federal antitrust cases that tying violations may be established by extrinsic evidence.

IV. BANCO'S POSITION WOULD THWART THE INTENT OF CONGRESS IN THE BHCA.

Banco has not explained how, when Congress expressed its intent in the BHCA to prohibit tying conditions imposed as "tacit understandings," it could possibly have intended to preclude any evidence to prove such an understanding. Banco's position makes no sense and would thwart the

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[4] Indeed, such a holding would be superfluous, as fraud, coercion, and mistake are widely recognized exceptions to the parol evidence rule. *See* J. Calamari & J. Perillo, *Contracts* at 159-161 (3d ed. 1987).

intent of Congress by allowing lenders to impose oral tying conditions that Congress plainly intended to prohibit.[5]

Banco also errs in arguing that the application of local parol evidence rules would not affect the scope of the BHCA's prohibitions. Significant differences in the various states' application of parol evidence rules – and, indeed, in the application of those rules by different courts within a state – are widely recognized. *See, e.g., Wilson Arlington Co. v. Prudential Ins. Co. of America*, 912 F.2d 366, 370 (9th Cir. 1990) (stating that "the parol evidence rule has been severely eroded in many jurisdictions during the past few decades" and recognizing significant differences between parol evidence rules of Virginia and California); J. Calamari & J. Perillo, *Contracts* at 134, 177 ("There is no unanimity as to the content of the parol evidence rule or the process called interpretation"; the "fog and mystery" surrounding the parol evidence rule stem from "basic disagreements" as to its application and "conflicting value judgments as to policy issues that are as old as our legal system and that are likely to continue as long as courts of law exist.")[6]

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[5] Banco errs both in claiming that it is "settled that the BHCA does not prohibit a bank from requiring a borrower not to borrow elsewhere during the term of the loan," Opp. at 14 n.12, as well as in relying on this statement in these proceedings. The plain language of the statute, as well as the legislative debate and the excerpt Banco quotes, indicate only that the BHCA was not intended to prohibit conditions that a bank "shall reasonably impose in a credit transaction to assure the soundness of the credit." 12 U.S.C. § 1972 (1)(E); 116 Cong. Rec. 32124-32126. It is obviously a question of fact whether a condition to a particular loan was imposed "reasonably" and "to assure the soundness of the credit." Banco never made such a claim here, nor did the trial court make such a finding.

[6] *See also Coca-Cola Bottling Co. v. Coca-Cola Co.*, 98 F.R.D. 254, 266 n.29 (D. Del. 1983) (refusing to certify class where

There is simply no question that the application of these different parol evidence rules, state by state, would in fact result in impermissible and unaccountable differences in the enforcement of the BHCA's prohibitions.

CONCLUSION

There is a clear conflict among the circuits with respect to the important question of federal law that Executive Leasing has raised. This issue can and should be reviewed.

Respectfully submitted,

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"differing state laws concerning parol evidence and assignments render generalized proof of plaintiff's contractual claims impracticable if not impossible"); *1726 Cherry St. Ptp. v. Bell Atlantic Properties, Inc.*, 439 Pa. Super. 141, 653 A.2d 663 (1995) (recognizing "starkly different conceptions of the parol evidence rule" in two cases decided by the Pennsylvania Supreme Court); *Jake C. Byers, Inc. v. J.B.C. Investments*, 834 S.W.2d 806, 811 (Mo. App. 1992) (referring to Missouri's parol evidence rule as "a deceptive maze rather than a workable rule").